No. 7323

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BERNHARD DAVIDOW,

Appellant,

vs.

LACHMAN BRO'S INVESTMENT CO., a corporation; G. P. ANDERSON; TITLE INSURANCE & GUARANTY CO., a corporation; CORPORATION OF AMERICA, a corporation; BANK OF AMERICA OF CALIFORNIA, a corporation; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a corporation,

Appellees.

Upon Appeal from the District Court of the United States for The Northern District of California, Southern Division. Honorable Frank H. Kerrigan, Judge.

Appellant's Opening Brief

PART TWO

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PART TWO

The attorneys for appellant differ as to the treatment of the questions involved, for which reason each presents the matter from his own viewpoint. They are united in believing that a sale under a second deed of trust, while a first deed of trust subsists, conveys absolutely no title. They also agree that when the bank released a portion of the property held under the first deed of trust the bank thereby lost its right to collect the balance of the debt and waived all the security held by it.

The questions herein raised are of the greatest interest to every lender and borrower upon real estate in California.

VINCENT SURR

QUESTIONS INVOLVED

A.

Does section 2924 of the Civil Code of the State of California provide a mode for transferring title to real estate by sale under a second deed of trust, while a first deed of trust is still outstanding?

B.

If that section attempts so to provide, is not the provision of the Constitution thereby violated which guarantees due process of law?

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APPELLANT'S OPENING BRIEF

Motions to dismiss have been sustained to plaintiff's complaint without leave to amend, and judgment for defendants has been entered thereupon.

Two primary questions present themselves:

I.

Is there a cause of action stated?

II.

Has the Federal Court jurisdiction to entertain the matter thus presented?

STATEMENT OF FACTS

Plaintiff borrowed from defendant bank $150,000.00, giving as security a first deed of trust covering two properties, one in the city and the other in the country.

Then plaintiff borrowed $25,000.00 elsewhere, giving a second deed of trust upon the same two properties.

Plaintiff not paying, the second trustee sold him out, obtaining $20,000.00 for both the properties, subject to the first deed of trust. Though a dummy was made use of, the purchaser was in fact the lender of the $25,000.00.

Thereafter such purchaser, wishing the country property to become entirely free from the first deed of trust, approached said bank and induced it to release the country property, for which release the purchaser paid the bank $25,000.00, and neither creditor regarded the debtor as at all concerned.

INTRODUCTION

This case is one of the most important in many years. Its decision will clear away the last, but extensive, remnant of the pathless jungle in which the principles controlling deeds of trust have wandered and lost and confused themselves so long.

The decision is evoked as a corollary or an aftermath to *Bank of Italy* v. *Bentley,* 20 Pac. (2d) 940, the first

case to take the debtor's point of view where deeds of trust are concerned and to establish for all time that the land is always the primary debtor, and the individual is a sort of surety; to wit, merely the secondary debtor under a deed of trust.

Herein will be determined which of two conflicting views is henceforth to prevail, to wit:

(a) The creditor's notion, or

(b) The less familiar, but the only rule consistent with *Bank of Italy* v. *Bentley* (supra).

These two views we now carefully set forth and compare.

THE CREDITOR'S NOTION

Our research thus far has not unearthed a case where the point was squarely put in issue, but the belief has no doubt been quite prevalent in the past and until the decision in the Bentley case, that the following was law, though now shown to be true only in part and to be inequitably false in other parts:

1. That by a first deed of trust in California the title passes to the trustee.

2. That despite such passage of legal title, a residuum, usually termed a legal estate (as distinguished from title), remains in the debtor.

3. That by a second deed of trust, since no title remains to pass, and some effect is surely intended, the residuum passes, as effectually as if by a quitclaim deed.

4. That by a sale under a second deed of trust, pre-

ceding sale under the first, every interest of the debtor passes to the purchaser, subject, however, to the rights of the *creditor* (not the debtor) under the first deed of trust; that the debtor has no more rights in or to the property, or to its further application after such sale.

5. That, as a consequence, the purchaser under second deed of trust, and the creditors and trustee under first deed of trust are thereafter free to release or negotiate or divide the spoils, with no further thought for the debtor.

THE DEBTOR'S VIEW REQUIRED BY THE DECISION IN BANK OF ITALY V. BENTLEY

1. Title passes to the first trustee.

2. A residuum remains in the debtor.

3. That residuum never passes by any mere deed of trust.

4. That a sale under a second deed of trust, while title outstanding in first trustee, cannot pass that title, nor can it nor does it pass the residuum. That all the interests of the debtor, as well as of the creditor under the first deed of trust, remain *in statu quo;* the debtor still having the right to demand that his land be sold under first deed of trust, to reduce or cancel all his debts.

5. That, as a consequence, the purchaser under a second deed of trust sale cannot regard the debtor as out of the picture while the first trust deed exists, and neither he nor the first trustee may do anything to preclude the individual debtor from causing to be realized

from the primary debtor (the property) all the money it will bring to extinguish the debts or diminish possible deficiency.

ARGUMENT

The crux of the controversy is, therefore, whether or not a sale, under second deed of trust while first deed of trust exists, entirely eliminates the debtor.

If it does, then of course the new owner and the first trustee cannot be criticized; and the debtor may not complain if, like the Roman soldiers in the Bible, "They parted His raiment among them; and for His vesture they did cast lots."

No layman or lawyer ever supposed that a debtor giving a second deed of trust intended thereby under any view to dedicate as security more than the margin existing between the amount of his first debt and the total value of his property.

At worst, the debtor figured on his property first paying his first creditor, and then what was left of it paying his second creditor, with the surplus coming to the debtor.

This is exactly what happens if the first trustee sells first.

The sale by the first trustee must always bring a higher price, because, by reason of the doctrine of relation back, he gives title of a date earlier than, and wholly free from, the second deed of trust, and this is equally true however long the chain of those who have succeeded to the second trustee.

The debtor never intended to put himself in a worse position if the second trustee should happen to sell first.

He never contemplated giving away or waiving his right to have his first indebtedness reduced or extinguished at any time by the full sale price obtainable by sale under first deed of trust.

The law presumes a margin in the security after the extinction of all encumbrances,

Cone vs. Combs, 18 Fed. 576,

and we all know that a bank will not lend more than 50% upon the value of a property.

The case at bar furnishes an interesting illustration.

We are dealing with a $150,000.00 first, and with a $25,000.00 second deed of trust. The properties have sold under the second for $20,000.00, and thereby the second creditor has valued them at $170,000.00. To a credit in at least the sum of $170,000.00, the debtor would seem to be inevitably entitled at some time and place.

Under the creditor's prevailing notion theory the debtor has no assets left, and owes $155,000.00 deficiency plus costs.

Had the second creditor bought the same property the same day at the same valuation, at sale under first deed of trust, then under the creditor's prevailing notion the debtor would have owed a deficiency of $5,000.00 instead of $155,000.00.

But a sale under a first deed of trust always produces

a better price, and an extraordinary result follows if the creditor's prevailing notion is correct.

That notion is that by the second creditor rushing things and selling before the first creditor does, he, the second creditor, can become entitled to the surplus, which the first creditor never can become entitled to, no matter how he hurries.

The bank valued these properties at about $300,000.00, or it would never have lent $150,000.00 on them. Suppose after the second trustee has sold for $20,000.00, subject to first deed of trust, the first trustee sells for $300,000.00, and suppose that pursuant to the creditor's prevailing notion the debtor left the landscape when the prior sale under second deed of trust took place; then, they contend that the bank must turn over all that vast surplus to the creditor-purchaser under second deed of trust, to-wit: a premium of $150,000.00 for being second instead of being first! We recognize the tendency of mankind to kick a debtor when he is down. But why treat a first creditor so scurvily as compared with a second creditor? Why forbid a first creditor, no matter when he sells, from robbing the debtor of his surplus, and then present it on a golden platter to a second creditor after the sale under first deed of trust has taken from that second creditor every vestige of title, every apparition of title that he ever pretended even temporarily to hold? The law is very clear that by relation back the sale under first trust deed wipes later transactions off the slate.

So far we have argued this as man to man, without calling in decision to support the obvious logic. Now we will sustain the debtor's position, not merely by reasoning, but also by decision.

In the first place, the *Bank of Italy* v. *Bentley* case decides that the debtor does not owe his $150,000.00 until his land, which is the primary debtor, has first paid all it can (in this instance $170,000.00), thereby showing that the first deed of trust subsists, not only for the creditor, but also for the hitherto forgotten man, the debtor; whatever may have happened under the second deed of trust.

In the second place, we will show that the second trustee never had any title to dispose of, because at all times title reposed in the hands of the first trustee; and he never had any residuum to dispose of, because residuum uncoupled from title never passes by any deed of trust, whether first, second, or third, but remains with the debtor until the creditor who actually holds the title sells him out. In other words, the creditor's prevailing notion does justice to nobody, and has neither logic nor decision to justify it, and falls before the reasoning in *Bank of Italy* v. *Bentley,* 20 Pac. (2d) 940.

Several questions here require our attention:

(A) What passes in California to a trustee under a first deed of trust?

(B) What passes to a trustee under a second deed of trust?

(C) What passes to a trustee under a third deed of trust?

(D) What passes by a sale by first trustee?

(E) What passes by a sale by second trustee while first deed of trust subsists?

(F) What passes by a sale by third trustee, while first and second deeds of trust subsist?

DISCUSSING "A"

California cases telling us what passes by a first deed of trust embrace the following:

Savings & Loan Soc. v. *Burnett,* 106 Cal. 514;

Bryan v. *Hobart,* 44 Cal. App. 315;

Sacramento Bank v. *Murphy* (Cal. 1910), 158 Cal. 390, 115 P. 232, 235;

City Lumber Co. v. *Brown,* 46 Cal. App. 603, 189 Pac. 830-832;

Mitchell v. *Price,* 196 Pac. 82-84;

Bateman v. *Kellogg,* 59 Cal. App. 464, 211 Pac. 46-52;

Hunt v. *Lawton,* 245 Pac. 803-805;

Finnie v. *Smith,* 257 Pac. 866-869;

Bayer v. *Hoagland,* 273 Pac. 58-62;

Wyser v. *Truitt,* 273 Pac. 147-149;

Meadows v. *Snyder,* 282 Pac. 1003-1005;

Am. Bldg. Material Service Co. v. *Wallin,* 2 P. (2d) 1007;

Wasco Creamery & Constr. Co. v. *Coffee,* 3 P. (2d) 588-589;

La Arcada Co. v. *Bk. of Am. of Cal.*, 7 P. (2d) 1115-1117;

Western Mtg. & G. Co. v. *Gray*, 8 P. (2d) 1016-1021;

Sun Lumber Co. v. *Bradfield*, 10 P. (2d) 183-185;

Miller v. *Citizens Tr. & Sav. Bank*, 16 P. (2d) 999-1000;

Tucker v. *Howe*, 17 P. (2d) 104;

In re Thurnell's Est., 19 P. (2d) 14-18;

Bank of Italy v. *Bentley*, 20 P. (2d) 940.

In the last of all these cases (April, 1933), that of *Bank of Italy* v. *Bentley* (20 P. (2d) 940-944), the court says:

> "Although . . . this state at an early date adopted the lien theory of mortgages, it adopted the title theory in reference to deeds of trust.
>
> " . . . Two lines of authority have developed as a result; one group emphasizing the *distinctions* between the two types of security—the other emphasizing the *similarity* between the two."

The next most recent case is *In re Thurnell's Est.*, 19 P. (2d) 14-18, from which we quote:

> "In order to execute the trust, he must be by the deed so far invested with the absolute title to the land as is necessary to enable him to convey it to the purchaser at the trustee's sale, *free of all right, title, interest or estate of the trustor,* or of anyone claiming under or through the trustor by virtue of any transaction occurring after the making of the trust deed. The deed of trust therefore vests in the

> trustee, for the purposes of the trust, *the absolute legal title to the entire* estate held by the trustor immediately prior to its execution, and that estate must remain in the trustee for that purpose until the trust is either executed or ceases to exist by reason of payment of the debt."

None of these cases denies that all the legal title passes to the first trustee. Some of these cases, however, decide that a legal estate, as distinguished from legal title, still remains in the debtor.

Proof that legal title passes to the first trustee, coupled with a power of sale, is found in the fact that he can convey title, at any time, as of the date at which he himself received title, and clear of any appearance of title attaching to any other person by reason of the later acts of debtor or of second or of third trustee thereafter.

Proof that some kind of estate or residuum remains in the debtor till the first trustee sells him out, is furnished by the fact that by a grant deed or by a quitclaim deed, subject to the deed of trust, the debtor may dispossess himself completely of the property.

DISCUSSING "B"

What Passes By a Second Deed of Trust

TITLE clearly cannot pass by a second deed of trust; and that is true not only because the first trustee holds all the title, but further because the cases say he positively has to hold it, in order that he may pass it on.

It is also true because a later sale by first trustee leaves the second trustee and his successors without either lien or title. They just fade out.

Under a mortgage, the debtor retains the title, yet he can give a power that will pass that title at the instance of the mortgagee.

Unlike a mortgagee, a trustee with a power of sale is still powerless unless the title itself reposes in him.

The mortgagee in using his power of sale, acts purely as the agent of the debtor.

The trustee represents alike the debtor and the creditor, and acts not for one party only.

RESIDUUM clearly does not pass to a trustee under a second deed of trust. What magic is there in being second in line to cause residuum to pass to a second trustee, when the same language failed to pass it to a first trustee?

If the mere expedient of duplicate instruments would extract extra security from a debtor, then every first creditor would secure the debt due to him by using duplicate deeds of trust, the first to bring him title, and the second to attract to him the residuum.

Again, a debtor may give three or more valid deeds of trust. If the first one carried off the title, and the second conveyed away the residuum, what then does the third get? The answer is that none gets the residuum,

because it is not in the nature of a deed of trust, be it first or fourth, to convey residuum. Residuum may pass by a deed; or it may pass by an attachment followed by an execution, or it may pass by a sale under a deed of trust, *where the seller has the title* when he makes the sale; but, thank heaven, our law is not yet complicated to the extent where identical language will pass one thing to my first creditor, a distinct thing to my second creditor, and something else or nothing to my third creditor.

What passes by a second deed of trust is the right to extinguish that indebtedness from any surplus at sale under first deed of trust, or the right, perhaps, to subrogation to the first deed of trust, or the right to sell his position as second in line to an outsider; but never the right to have or convey *the land itself* while the first deed of trust subsists.

DISCUSSING "C"

What Passes By a Third Deed of Trust

By a third deed of trust a trustee receives everything that a trustee under a second deed of trust receives, and occupies the same position, except that he is third in line. It was never contemplated that any title or residuum should vest in him or that he should be secured in any measure except by that difference existing

between the sum of the two prior debts and the market value of the property described. He cannot, by going through the form of a sale, which will probably produce little or nothing, preclude the debtor from insisting that the first creditor at some time sell and credit the debtor with all that his property will sell for, unhampered by any act of second or third creditor, always however applying the surplus to extinguish secured and junior debts in order of their preference.

DISCUSSING "D"

What Passes By Sale Under First Deed of Trust

Here the trustee has the title and he has the power, and a sale by him passes title and residuum. Such sale discloses the emptiness of every claim to title or interest of later date than the day when the title came to (not merely from) the trustee.

Those holding under a second deed of trust may sell and sell again, yet the buyer under first deed of trust holds title so clear as against them all that he need not go to court at all to clear the fog which they create away. They have not been able to create a cloud.

If any claim by deed or by lease or by execution, or by deed of trust or sale under mortgage, it is all the same. If their supposed title is later in point of time than the deed to the first trustee, his sale shows the hollowness of their pretensions to title. His sale does

not take any title away from them, but shows they never had any.

Weber v. *McCleverty,* 149 Cal. 316;
Ferry v. *Fisk,* 202 Pac. 965;
Dugand v. *Magnus,* 290 Pac. 310.

DISCUSSING "E"

What Passes By Sale Under a Second Deed of Trust

Obviously nothing passes which the first trustee retains; and he retains all *title.*

And nothing passes which the debtor retains. And he retains all the *residuum* which, as we have seen hereinbefore, does not pass by a deed of trust, and does not pass by the exercise of a power of sale, by a trustee, where such power of sale is divorced from title. The debtor also, and always, retains the right to insist that the security held by the first trustee be exhausted before the debtor owes him any deficiency, and that the surplus from such sale be applied to extinction of the second debt, then the third debt, etc., and balance thereafter to the debtor.

The sale being premature may perhaps serve as an assignment of right to sell title later when and if the first deed of trust is out of the road, or it may not. It is not the purpose of this brief to go beyond what is herein essential.

PRIMARY DEBTOR

The land is the primary debtor; and the human debtor only owes what the land cannot pay; and does

not owe it until the land as primary debtor has paid all it can.

Bank of Italy v. *Bentley,* 20 P. (2d) 943;
McKean v. *German Am. Bk.,* 118 Cal. 339;
Chrisman v. *Lauterman,* 149 Cal. 651;
Curtis v. *Holee,* 195 P. 397;
Ladd v. *Mathis,* 11 P. (2d) 79;
Rein v. *Callaway,* 65 P. 63;
Secs. 2845, 2846, C. C.

The human debtor, in his quasi-surety capacity has a right to require the primary debtor to be made to pay.

Secs. 2840, 2845, 2846, 2850, Civil Code.

DEFICIENCY

Deficiency can only be ascertained by and after a sale in the agreed manner of all, and not merely part, of the property.

Bull v. *Coe,* 77 Cal. 54;
Hall v. *Arnott,* 80 Cal. 348;
Woodward v. *Brown,* 119 Cal. 108;
Case v. *Copren Bros.,* 32 Cal. App. 195;
Ferry v. *Fisk,* 202 Pac. 964;
Lewis v. *Hunt,* 24 Pac. 2d. 556-558.

CONVERSION

With the foregoing principles in mind, it is apparent that the debtor's interest was not extinguished by sale under second deed of trust, and that the creditor-

purchaser at sale under second deed of trust had therefore no right to induce the first trustee to release or sell to him any portion of the property securing the first deed of trust.

It will be recalled that there were two properties, one in the city, the other in the country, and that the first trustee released the country property when the second creditor offered and paid him $25,000.00 for doing so.

Where trustees apply the property entrusted to them to uses other than specified and contemplated, the result is a conversion, or quasi conversion of the debtor's property which wipes out the debt itself. See:

Metheny v. *Davis,* 290 Pac. 91;
Hibernia v. Thornton, 109 Cal. 429;
Bendel v. *Crystal Ice Co.,* 82 Cal. 199;
Blodgett v. *Rheenschildt,* 56 Cal. App. 728-738;
Loughborough v. *McNevin,* 74 Cal. 255;
Everett v. *Buchanan,* 6 N. W. 439;
Rein v. *Calloway,* 65 Pac. 63;
C. C., 2910, 2840, 2845, 2850.

It, therefore, becomes apparent that the first trustee has disabled itself from ascertaining the deficiency, and also from suing for deficiency, if any.

It should also be the rule that the second creditor-purchaser, by persuading the first creditor to depart from its trust and release the land which is the primary debtor, thereby in like manner forfeited its right to collect any money from the debtor whose property these creditors have sought to convert.

Further than this, we do not have to go to show that the *complaint states cause of action:*

To remove cloud upon the plaintiff's land caused by sale, which passed neither title nor residuum;

To cancel evidences of $150,000.00 debt existing no longer, save in appearance;

To ascertain whether or not any portion of the $25,-000.00 second indebtedness at all exists, and to define that situation and adjust the rights of everybody.

DUE PROCESS OF LAW

By its terms, Section 2924 of the Civil Code provides a way by which the trustee under a deed of trust may pass title from a debtor to a creditor or to some other purchaser.

A trustee under a *first* deed of trust may make his sale and point to that statute and say truly that by following its provisions he has succeeded in transferring such title.

But a trustee under a *second* deed of trust, while the first deed of trust is still outstanding, points to that statute and claims the shelter of its provisions, and asserts that because of following what the legislature has said literally, he, therefore, who never received title by his second deed of trust has nevertheless, by arbitrary declaration of statute, and by the use of an artificial proceeding unadapted to the nature of his case, passed title which he did not have to a new owner.

Section 2924 of the Civil Code, therefore, when availed of by a trustee under a second deed of trust

while the first trust deed is still outstanding, takes away property without due process of law, passing title from one who has it not, by mere arbitrary fiat, and using a method or shibboleth wholly unadapted to the situation and to the thing desired to be accomplished.

We quote from Section 2924 of the Civil Code the portions with which we are here concerned:

> "The trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of the county wherein the mortgaged or trust property or some part thereof is situated, a notice identifying the mortgage or deed of trust and giving the book and page where the same is recorded or a description of the mortgaged or trust property, and containing a statement that a breach of the obligation for which such mortgage or transfer in trust is security has occurred, and of his election to sell or cause to be sold such property to satisfy the obligation;
>
> "Not less than three months shall thereafter elapse; and
>
> "The mortgagee, trustee or other person authorized to make the sale shall give notice of the time and place thereof, in the manner and for a time not less than that required by law for sales of real property upon execution."

From such terms as

> "his election to sell or cause to be sold *such property,*"

it is clear this section contemplates the sale of property by one who has it to sell, and not the use of these provisions in a vain attempt at a sale by a second trustee who has no title to convey while the first deed of trust subsists.

There is no way in which a man so situated can pass title till the first trustee is disposed of.

There are things which a mere fiat cannot accomplish, and transfer of title from one who has it not is one of them.

> "No state can make everything due process of law which by its own legislation it declares to be such."
>
> *Beck* v. *Ransome Creamery Co.,* 184 Pac. 431-433.

The court also said in that case:

> "The guaranty is always and everywhere present to protect the citizen against arbitrary interference with his rights."

What could be more arbitrary than Sec. 2924, C. C., as applied to second trustees, where first deed of trust is outstanding?

Mr. Justice Swayne, in *Osborne* v. *Michelson,* 80 U. S. (13 Wall.) 634, 20 L. Ed. 689, at page 695, says:

> "The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And the deprivation would be 'without due process of law.' This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the state and of the nation. Taylor v. Porter, 4 Hill 146; Wynehauer v. The People, 13 N. Y. 394; Wilkeson v. Leland, 2 Pet. 258."

In *Taylor* v. *Porter,* 4 Hill 146, cited by Mr. Justice Swayne in the case just quoted from, Mr. Justice Bronson says:

> "If the legislature can take the property of A and transfer it to B, they can take A himself, and

> either shut him up in prison, or put him to death. But none of these things can be done by mere legislation. There must be 'due process of law.' "

It is said by the author in 1 Hilloughby on the Constitution of the United States, second edition, 1928, Sec. 11, p. 15:

> "The question as to the constitutionality of law does not, in all cases, go to the essential validity of the law, that is, as applicable to any and all conditions, but may depend upon the particular facts to which it is sought to be applied. Thus, in Poindexter v. Greenhow, the court said: 'And it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void upon its face, but is complained of only because its operation in the particular instance marks a violation of a constitutional right; for the cases are numerous, where the tax laws of a state, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts, prohibited by the constitution, or because in some other way they operate to deprive the party complaining, of a right secured to him by the constitution of the United States.' Thus, the cases are numerous in which the Supreme Court, in holding particular statutes unconstitutional, has qualified or explained this holding by declaring that the statutes 'as construed and applied' are thus to be deemed unconstitutional."

See, also, section 12 of the same author, and the cases cited under both sections.

The court says in *Castillo* v. *McConnico,* 168 U. S. 680:

> "The plaintiff in error has no interest to assert

that the statute is unconstitutional because it might be construed so as to cause it to violate the constitution. His right is limited solely to the enquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law."

And again in *Bellingham, etc.,* v. *New Whateum,* 172 U. S. 314, 43 L. 460:

"By its answer the defendant raised a federal question inasmuch as it alleged that the notice of the reassessment was insufficient, and specifically that by reason thereof the property was sought to be taken without due process of law and in conflict with terms of the 14th amendment to the Constitution. This court, therefore, has jurisdiction of the case."

In the case of *Ochoa* v. *Hernandez y Morales,* 57 L. Ed. at page 1437 (230 U. S. 161) the court said:

"Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, *contrary to settled usages and modes of procedure* and without notice or an opportunity for a hearing."

Due process of law quite frequently is evoked where a statute is stretched to include within it what never was within its scope, though present in its language.

In *Follette* v. *Pac. Lt. & Power Co.,* 208 Pac. 295-302, the court, in discussing the Torrens Title Act, says:

"What then becomes of the ancient doctrine of bona fides and good faith in the purchases of real property? What of due process of law?

"Under this section of the law *as thus interpreted,* these would no longer exist."

And on page 304 we find:

> "That the provisions of the Land Title Law which purport to entitle the purchaser of a registered title to the premises in the actual possession and occupancy of another to hold the same superior to the prior rights and interests of such possessor, notwithstanding that such registered title is subject to the infirmities shown to exist in the instant case, are obnoxious to the provision of the federal constitution, which provides that persons shall not be deprived of their property without due process of law."

Everywhere the decisions emphasize the necessity of a proceeding adapted to the end desired, as distinct from a meaningless arbitrary pronouncement. See for example:

Golden Gate Bridge, etc., v. *Felt,* 5 P. (2d) 585 (from Preston, J., *dissenting):*

> "That such *discrimination* raises the question of due process of law, and equal protection of the law, has been repeatedly held by the Supreme Court of the United States.
>
> "As said in *Memphis & Charleston Ry.* v. *Pace,* 282 U. S. 241-246, 75 L. Ed. 315:
>
> > 'But however the tax may be laid, *if it be palpably arbitrary,* and therefore *a plain abuse of power,* it falls within the condemnation of the due process clause.' "

Gregory v. *Hecke,* 238 Pac. 787:

> "(793) Due process of law does not necessarily mean that a person is entitled to a trial in a court before he may be deprived of what may be equivalent to property rights. It does, however, mean *that an orderly proceeding, adapted to the nature*

of the case, shall be accorded to the owner of the property, in which he may be heard and where he may defend, enforce and protect his personal rights."

City of L. A. v. *Oliver,* 283 Pac. 298:

"(308) It means a process which

'following the forms of law *is appropriate to the case, and just to the parties to be affected.*'"

Jardine v. *Superior Court,* 293 Pac. 117, ... Cal. App. ..... (Nov. 5, 1930):

"(119) Although it is the peculiar province of the legislature to determine procedure, it is nevertheless for the courts to determine whether the method prescribed by the legislature actually brings a person before the court. (Discussing Sec. 388, C. C. P., re service of summons on associations.)

"Petitioners contend that such a procedure is violative of the constitutional provision prohibiting the taking of property without due process of law. (Cites County of Santa Clara v. So. Pac. Ry., 18 Fed. 385.)

"It means a process which, following the forms of law, *is appropriate to the case,* and *just to the parties to be affected.* It must be pursued in the ordinary mode prescribed by the law, *it must be adapted to the end to be attained;* and, wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment." (Writ of Prohib. granted in part.)

People v. *Assoc. Oil Co.,* 297 Pac. 536, 537:

"The decisions of the Supreme Court of the United States have recognized and determined that

> the states have the right to enact laws, under the police power, providing for the conservation of the oil and gas resources within their borders, and that such laws, *if not clearly arbitrary or unreasonable,* do not contravene the due process and equal protection provisions of the Federal Constitution, nor take property for public use without compensation."

Paiva v. *Calif. Door Co.,* 242 Pac. 887, 891 (Forestry Act, Stats. 1905, p. 235, Sec. 18):

> "Civil liability for forest fires.
>
> "Respondent contends that Sec. 18 'provides for a civil liability in cases where a fire is caused or escapes unavoidably'; and that such provision is therefore unconstitutional, in that it would deprive a person of property without due process of law.
>
> "It may be conceded that in a case such as this, it is beyond the power of the legislature to impose a liability for an accidental and unavoidable fire. . . . The provision, however, may be eliminated without affecting the other provisions of the statute."

The foregoing authorities make it clear that the guaranty of due process of law may be invoked at any time when the provisions of a state statute literally produce results uncontemplated and obnoxious to the guaranty in question. That is to say, the courts hold a statute, *as so construed,* to be unconstitutional, while nevertheless the statute is constitutional as regards those properly within its scope.

This is but another way of saying that Section 2924, C. C., is not intended to apply to sales under second deeds of trust, while the first deed of trust subsists, and

is unconstitutional when so applied, and that title is still in plaintiff despite the mummery gone through in following the letter (and not the spirit) of the statute, and causing those lands now to appear as the property of defendant.

In conclusion, and out of our great respect for the Honorable Judge who has dismissed the action, we smite upon our breasts saying that if we had only made ourselves as clear in the District Court as we believe we have herein, we should not have been obliged to ask, as we now do, that said action be reinstated and proceeded with, under enlightening instructions from this court, and that said order of dismissal be reversed.

Respectfully submitted,

VINCENT SURR,

Attorneys for Plaintiff Appellant.

One of two and also interested on his own account as holder of deed to share in the property affected, as tenant in comon with litigant